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No. 93-1677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF OKLAHOMA, Ex Rel.
OKLAHOMA TAX COMMISSION,

Petitioner,

v.

JEFFERSON LINES, INC.,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF THE AMERICAN BUS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

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Pursuant to Rule 37 of the Rules of this Court, the American Bus Association, Inc. respectfully submits this brief as *amicus curiae* in support of the respondent. The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The American Bus Association ("ABA") is the principal national trade association for the intercity bus industry. ABA's members include more than 500 intercity bus companies, all of whom are engaged in the interstate transportation of passengers by motor vehicle. ABA's members operate more than 20,000

buses and provide more than 90 percent of the intercity bus transportation in the United States.

The issue in this case is of vital importance to ABA's members and the people who ride their buses. The question presented is whether a state may constitutionally impose an unapportioned sales tax on the sale of interstate transportation services, including the portion of the transportation that takes place outside the state. To ABA's knowledge, Oklahoma is the only state that has sought to impose a sales tax on interstate transportation of any kind. To ABA's knowledge, no other state has attempted to impose a sales tax or similar tax on the interstate transportation of either passengers or freight by bus, railroad, truck or airplane since this Court's decision in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948). In fact, it appears that Oklahoma itself has not sought to enforce the application of its sales tax statute to interstate transportation generally, but has done so only in the context of asserting tax claims against the estates of two bus companies, respondent Jefferson Lines, Inc. and Greyhound Lines, Inc., after they petitioned for bankruptcy.[1]

Accordingly, there is no basis for the claim of amicus curiae National Conference of State Legislatures et al. ("NCSL") (NCSL Br. at 2) that the decisions below present "a serious threat to the well-established power of States to collect taxes on sales transactions occurring completely within their borders . . . ." Inasmuch as Oklahoma appears to be the only state that has attempted to apply an unapportioned tax to the sale of interstate transportation and has done so only in two instances, the decisions below present no threat whatever to the established taxing authority of the states.

On the other hand, a reversal of the decisions below would have an extremely adverse affect on interstate transportation

[1] See J.A. 3 and *In re Eagle Bus Manufacturing (Greyhound), Inc., et al.*, No. B-93-58 (S.D.. Tex., October 4, 1993) (reproduced at Addendum A-12 to respondent's brief).

companies and on the free flow of interstate transportation. As discussed further below, allowing states to impose unapportioned sales taxes on interstate transportation services would permit, and indeed invite, multiple state taxation of those services, contrary to a core purpose of the Commerce Clause.

The effects would be particularly serious for the intercity bus industry and the public it serves. Largely as a result of intense competition from other modes of transportation, intercity bus companies have been struggling for several decades to maintain their services in the face of declining ridership.[2] The recent bankruptcies of respondent and Greyhound Lines are symptoms of that struggle. In addition, those who continue to ride intercity buses are typically persons of far more limited means and transportation alternatives than users of other transportation modes. [3] For these reasons, of all the sectors of the interstate transportation industry, intercity bus companies and those whom they serve are the least able to bear the very substantial burden that taxes like Oklahoma's would impose on them.

SUMMARY OF ARGUMENT

The courts below correctly found that Oklahoma's sales tax, as applied in this case, is not fairly apportioned to activity within the state, and therefore contravenes the Commerce Clause, because it has been applied to the full price of interstate transportation services, a portion of which are performed outside the state.

[2] GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SURFACE TRANSPORTATION SUBCOMMITTEE, COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, U.S. SENATE, SURFACE TRANSPORTATION — AVAILABILITY OF INTERCITY BUS SERVICE CONTINUES TO DECLINE 9 (JUNE 1992).

[3] *Id.* at 29-32. Surveys have shown, for example, that a far higher proportion of bus riders than consumers of other modes are elderly, young, poor, disabled, reside in rural communities and do not have access to an automobile.

Petitioner is incorrect in arguing that the tax at issue is properly apportioned because it applies only to a transaction, the sale of bus tickets, that occurs entirely within the state, and in relying on decisions upholding unapportioned sales taxes on sales of tangible property. For purposes of constitutional analysis, there are critical differences between taxes on the sale of tangible property and taxes on the sale of services. With respect to taxes on services, the sales transaction is not a discrete activity that can be meaningfully separated from the service that is being sold. In fact, the Oklahoma statute itself defines the sale of taxable services as the "furnishing or rendering of services taxable under this article." Accordingly, under the statutory definition, the activity being taxed is the furnishing of those services. Since part of that activity in this case occurred outside the state, the tax is not properly apportioned.

Furthermore, an unapportioned sales tax on interstate transportation services presents a very real risk of multiple taxation because, in terms of their actual impact and economic effect, there is no essential difference between a sales tax and a gross receipts tax of the kind considered by the Court in the *Central Greyhound* case. Since, under *Central Greyhound*, other states can impose a tax on the gross receipts from their portions of interstate bus trips originating in Oklahoma, allowing Oklahoma to impose an essentially equivalent tax on the price of the entire trips would clearly result in multiple taxation.

This Court's few decisions involving sales taxes on services reflect a recognition that such taxes, to be constitutional, must be apportioned on the basis of where the service is performed. Although in *Goldberg v. Sweet*, 488 U.S. 252 (1989) the Court upheld an unapportioned tax on interstate telephone services, it did so expressly on the grounds that, under the statute considered there, there was no risk of multiple taxation and that the physical characteristics of telecommunications services rendered apportionment infeasible. Indeed, the Court specifically

contrasted the infeasibility of apportionment in those circumstances with the feasibility of apportioning taxes on transportation services such as the bus services involved in *Central Greyhound*.

ARGUMENT

THE COURTS BELOW CORRECTLY FOUND THAT OKLAHOMA'S SALES TAX AS APPLIED TO THE FULL PRICE OF INTERSTATE BUS TRANSPORTATION IS NOT FAIRLY APPORTIONED AND THEREFORE CONTRAVENES THE COMMERCE CLAUSE.

Petitioner's and NCSL's central argument is that the courts below erred in concluding that the tax at issue applies to the transportation service itself and therefore violates the Commerce Clause because it is not properly apportioned to activity occurring within Oklahoma. Instead, they argue, the tax applies only to a transaction — the *sale* of the transportation — and because that transaction occurs entirely within the State of Oklahoma, the tax is properly apportioned. In support of their argument, they rely on decisions of this Court upholding state sales taxes on the sale or lease of goods in the taxing state notwithstanding some prior or subsequent movement or use of those goods in interstate commerce. See, *e.g.*, *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940); *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986); *Itel Containers International Corp. v. Huddleston*, 507 U.S. ___, 113 S.Ct. 1095 (1993).

The basic flaw in these arguments, ABA submits, is that they view a tax on the sale of transportation services as equivalent, for constitutional purposes, to a tax on the sale of tangible property. They fail to recognize very important differences between taxes on the sale of tangible property and taxes on the

sale of services. Those differences in this case are critical to a proper constitutional analysis.

The question that the court of appeals addressed (and which ABA will address here) is whether the tax at issue, as applied by petitioner to sales of interstate bus transportation, satisfies the requirement of the Commerce Clause that state taxes be fairly apportioned to activities occurring within the taxing state.[4] As the Court stated in *Goldberg v. Sweet*, 488 U.S. 252, 260-261 (1989): "[T]he central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." In order to be fairly apportioned, the Court has held that a tax must be both internally and externally consistent. *Id.* at 261. Most of this Court's sales tax cases have involved taxes on the sale of tangible property, and the Court has consistently held that such taxes are fairly apportioned because the sale of tangible property involves a specific activity — either the physical delivery of the goods or the transfer of title — that can meaningfully be said to occur entirely within the taxing state. For that reason, such taxes are both internally and externally consistent.

With respect to taxes on *services*, however, the sales transaction is not a discrete activity that can be meaningfully separated from the service that is being sold. In this case, the court of appeals correctly stated:

> To say that only the purchase of a ticket is taxed, and not the use of the ticket, ignores the fact that the real value of the ticket is the right to ride a bus. The ticket without the travel would be of scant value to a customer. We will not separate the sale of a piece of paper from the service which it represents. To hold

[4] The court of appeals did not consider whether the tax satisfied the other three requirements of the Commerce Clause set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 278 (1977), and accordingly ABA will not do so here.

> otherwise would elevate form over substance and require this Court to ignore economic realities.

J.A. 27.

Indeed, the fact that the sale of a service, in contrast to the sale of tangible property, cannot be meaningfully separated from the service itself and the use of that service is reflected in the statutory definition of "sale" in Oklahoma's sales tax statute. OKLA. STAT. tit. 68, § 1352(L)(4) (Supp. 1989) provides, in pertinent part, that for purposes of Chapter 68 (emphasis supplied):

> "Sale" means the transfer of either title or possession of tangible personal property for a valuable consideration . . . *or other transactions as provided by this subsection, including but not limited to:*
>
> . . .
>
> (4) *The furnishing or rendering of services taxable under this article.*

In other words, if the sale is of tangible personal property, the activity being taxed is the physical "transfer of either title or possession." But if the sale is a sale of services, the activity being taxed is "the furnishing or rendering of those services," and the situs of the activity is wherever the services are furnished or rendered.[5]

[5] Petitioner appears at times in its brief to be trying to argue that this case does involve the sale of tangible property — the bus ticket — rather than the sale of transportation services (see Pet. Br. 11-12, 18), but there is plainly no merit to this claim. As it acknowledges elsewhere in its brief (Pet. Br. 7-8), the tax at issue is imposed "upon the sale of tangible property and certain services, including transportation for hire by bus." Amicus NCSL also correctly recognizes that the case involves "the sale of specified transportation services, for which the ticket serves as a receipt." NCSL Br. 8. It also acknowledges that its position does not "in any way depend on the existence of a ticket or on any supposed distinction between the sale of a ticket and the sale of the transportation service which that ticket represents." *Id.* 8, n.3.

Because the activity being taxed in this case, *under the statutory definition*, is Jefferson Lines' furnishing of interstate bus transportation, and because that activity does not occur entirely within Oklahoma, the application of the tax to the entire price of the transportation clearly fails the internal consistency requirement. If Jefferson's activity in providing interstate bus trips was taxed in its entirety by every state in which those trips took place, multiple taxation would obviously result.

Even if the Oklahoma statute (or the tax authorities through interpretation) tried to define the triggering taxable event in some way that gave that event a specific situs in Oklahoma (*e.g.*, defined it in terms of the delivery of the ticket), the tax might pass the internal consistency test, but it would still fail the external consistency test. As this Court explained in *Goldberg v. Sweet*, 488 U.S. at 262:

> The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. . . . We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity.

In this case, regardless of the situs of the triggering event, as long as Oklahoma's tax is being imposed on a service that is performed in more than one state, some portion of the price of that service, and therefore some portion of the amount of the tax, will necessarily be for activities that occur outside the state. As the court of appeals correctly observed, the economic realities are that "[a] ticket price is set, at least partially, on the number of miles travelled." J.A. 27.

Furthermore, regardless of the situs of the triggering event, an unapportioned sales tax on interstate transportation services presents a very real risk of multiple taxation and the concomitant stifling of interstate activity. That is so because, in terms of their

actual impact and economic effects, there is no essential difference between a sales tax and a gross receipts tax of the kind considered by this Court in the *Central Greyhound* case. Although a sales tax is imposed, at least nominally, on the purchaser (although collected by the seller) and a gross receipts tax is imposed on the seller, in the case of taxes on interstate transportation services the economic effect is the same.

Consider a bus ticket for a trip between Oklahoma City and Topeka, Kansas which, without any tax, would cost twenty dollars. Whether Oklahoma imposes a 4.5 percent sales tax nominally on the passenger or a 4.5 percent gross receipts tax on Jefferson Lines, the effect on Jefferson and its customers will be the same. If market conditions permit, the total price to the customer will be $20.90 in either case. If market conditions require Jefferson to absorb some part of the cost of the tax by reducing the base ticket price and charging the customer a total price of less than $20.90, the effect of the tax on Jefferson and its customers would still be virtually the same in either case.[6]

Under this Court's decision in *Central Greyhound*, Oklahoma could not impose a gross receipts tax on Jefferson on its total revenue from the ticket in this example. It could only impose such a tax on the portion of that revenue attributable to the transportation in Oklahoma. If that were 50 percent of the trip, both Oklahoma and Kansas could impose a gross receipts tax on only $10.00 of the ticket price. If, however, Oklahoma were permitted to tax the entire $20 by doing so in the form of

[6] If the market imposed a rigid maximum on the total price one could charge the customer, in theory there would be a small difference to the bus company whether the tax was imposed in the form of a sales or a gross receipts tax. For example, if the total price chargeable to the customer in this case were $20.00, a 4.5 percent gross receipts tax would yield Jefferson $19.10 in after tax revenues, whereas under a sales tax, its net revenue would be $19.14. As a practical matter, that difference is not significant. The economic impact of a given tax on companies and their customers will be a function of the size of the tax and market conditions and will be virtually the same whether the tax is in the form of a gross receipts tax or a sales tax.

a sales tax and if Kansas imposed a gross receipts tax on $10 of the revenue from the ticket, the economic effect would clearly be multiple taxation.

Accordingly, the court of appeals correctly concluded that this Court's decision in *Central Greyhound* and the principles established therein are fully applicable in this case.[7]

We believe that this Court's relatively few decisions dealing with sales taxes on services reflect a recognition that such taxes must be apportioned on the basis of where the services are performed if it is feasible to do so. One such case is the Court's seminal decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In *Complete Auto*, the Court upheld what it characterized as a Mississippi sales tax assessed on "transportation of persons or property for compensation or hire *between points within this state*." *Id.* at 275 (quoting Miss. Code Ann., 1942, § 10105 (1972 Supp.) (emphasis supplied.) Significantly, the tax was limited to transportation within the state, and the Court noted that no claim had been made that the tax was unfairly apportioned. *Id.* at 278.

Another case involving a tax on services that the Court described as having "many of the characteristics of a sales tax" is *Goldberg v. Sweet*, 488 U.S. at 262. In that case the Court upheld an unapportioned Illinois tax on interstate telephone calls that are charged to an Illinois service address, and petitioners and NCSL rely on that decision in support of their claims here. In *Goldberg*, however, the Court upheld the tax on the basis of very different facts from those involved here, and we submit that the Court's analysis in fact supports the decisions below.

First, in *Goldberg*, the Court held that there was no possibility of multiple taxation because the Illinois statute allowed

[7] ABA submits that there is no merit to the suggestion of NCSL (NCSL Br. 16-18) that *Central Greyhound* is outmoded and does not reflect current Commerce Clause jurisprudence. *Central Greyhound* has been cited and applied in many cases by this Court, including *Goldberg v. Sweet*, 488 U.S. at 260, 264, on which NCSL relies.

taxpayers a credit in the amount of any tax paid to another state on the same call. 488 U.S. at 263-64. There appears to be no such credit in the Oklahoma sales tax for sales taxes or gross receipts taxes paid to other states on the same interstate bus trip.

Second, the Court in *Goldberg* found that the physical characteristics of interstate telecommunications made apportionment of sales taxes simply infeasible, and in that respect it specifically contrasted taxes on "bus, train or truck" transportation. The Court stated:

> It should not be overlooked, moreover, that the external consistency test is essentially a practical inquiry. In previous cases we have endorsed apportionment formulas based upon the miles a bus, train or truck traveled within the taxing State. But those cases all dealt with the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State. See, *e.g.*, *Central Greyhound*, 334 U.S. at 663 ("There is no dispute as to feasibility in apportioning this tax"); see also *Western Live Stock [v. Bureau of Revenue]*, 303 U.S. [250] at 257. These cases, by contrast, involve the more intangible movement of electronic impulses through computerized networks. An apportionment formula based on mileage or some other geographic division of individual telephone calls would produce insurmountable administrative and technological barriers.

488 U.S. at 264 (footnote omitted).

In the present case, like *Central Greyhound* and unlike *Goldberg*, apportionment on the basis of mileage presents no difficulties, let alone insurmountable barriers, as the court of appeals noted. J.A. 30.

In sum, the courts below correctly held that a state may not impose an unapportioned sales tax on the full price of interstate transportation. Furthermore, ABA submits that the fact that no state, other than Oklahoma on two occasions, has sought to do so reflects a general agreement with that proposition among the states.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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